

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD BIBBS

Claimant

VS.

KSU

Respondent

AND

HAWKEYE SECURITY INS. CO.

Insurance Carrier

Docket No. 1,012,981

ORDER

Respondent and its insurance carrier (respondent) requests review of the January 4, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Bryce D. Benedict.

ISSUES

The ALJ granted claimant's request for temporary total disability (TTD) benefits as well as medical treatment for his left shoulder under the direction of Dr. William T. Jones, or his referrals. In addition, respondent was also ordered to pay certain bills while other bills, incurred before December 4, 2003, were held in abeyance pending a later hearing.¹

The respondent appeals and alleges the ALJ erred when he implicitly found that the claimant's left shoulder complaints arose out of and in the course of the claimant's employment. Respondent maintains that while claimant sustained a compensable injury on March 5, 2001 to his right big toe, claimant did not injure his left shoulder on that date. Respondent alleges claimant failed to establish that his post-accident left shoulder

¹ ALJ Order (Jan. 4, 2005) at 1.

complaints are a direct and natural consequence of claimant's original injury. First, respondent argues that claimant underwent a prior surgery to his left shoulder in 1997 and that "[t]his clearly demonstrates that claimant had pre-existing pathology in this part of his body."² Second, respondent maintains Dr. Jones has failed to render any diagnosis with regard to the left shoulder and "[a]bsent a clear medical diagnosis to this part of the body, how can it be said that Mr. Bibbs' use of crutches have caused 'injury' to his left shoulder?"³ As such, respondent believes the ALJ exceeded his jurisdiction in awarding claimant temporary total disability benefits and additional medical treatment, both past and present, and asks the Board to reverse the ALJ's preliminary hearing Order.

Claimant contends his present complaints of left shoulder pain are attributable to his use of crutches during the period of time he was recovering from his most recent toe surgery which was necessitated by his compensable on-the-job injury on March 5, 2001. And because his present complaints are the natural and probable consequence of his initial right toe injury, he is entitled to the benefits awarded by the ALJ.⁴ Thus, claimant maintains the ALJ's preliminary hearing Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

There is no dispute between the parties as to the underlying facts surrounding claimant's March 5, 2001 accident. On that date, claimant was moving furniture while working for respondent when a table slipped out of his hand and the corner of the table crashed on the joint of claimant's foot. His course of treatment has been anything but ordinary and has involved numerous complications including kidney failure, liver and blood pressure problems, and no less than 3 surgeries.

Dr. William T. Jones has been treating claimant's right foot problems and on August 10, 2004, after claimant's second foot surgery, noted claimant "*still* has pain in the left shoulder which seems to be his number one problem."⁵ Dr. Jones went on to assess claimant's condition as follows:

² Respondent's Brief at 3 (filed Feb. 1, 2005).

³ *Id.*

⁴ Claimant's Brief at 2 (filed Feb. 18, 2005).

⁵ P.H. Trans., Cl. Ex. 2 (emphasis added).

1) Satisfactory progressive healing of the first MTP arthrodesis of the right foot. 2) Persistent pain in the left shoulder which is a result of ambulating with crutches following his foot surgery. Worker's Compensation has not responded to our request to further evaluate the shoulder. I believe he needs an MRI and then hopefully it is something that could be resolved with a cortisone injection.⁶

Despite Dr. Jones' recommendation, respondent failed to provide the sought after treatment and hence, a preliminary hearing was requested and held. The ALJ granted claimant's request for ongoing medical care, payment of certain medical bills and TTD benefits. Implicit in this order was the conclusion, no doubt based upon Dr. Jones' recommendations, that claimant's left shoulder complaints are the natural and probable result of claimant's use of the crutches which were necessitated following his second and third foot surgeries. The Board agrees with this factual finding and legal conclusion.

First, *the physician selected by respondent* has recommended an MRI so he can better evaluate, diagnose and treat claimant's left shoulder complaints. Second, that same physician has stated, quite clearly in his August office note, that the claimant's persistent pain "is a result of ambulating with crutches" following surgery. These two factors standing alone justify the ALJ's finding. The respondent's contention that the lack of a definitive diagnosis precludes the conclusion that claimant's shoulder condition was caused by crutches is without merit. The MRI is necessary to make a diagnosis and respondent's own doctor suggested the test be performed. And he identified the causal connection between the test and the claimant's underlying condition. When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁷

Likewise, it is equally disingenuous that respondent suggests claimant's pre-existing pathology in his shoulder somehow negates its liability in this matter. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁸

Under these facts and circumstances, based upon this record developed to date, even if claimant had some impairment or pre-existing injury or disease process in his shoulder, that does not necessarily mean respondent has no liability to provide the medical

⁶ *Id.*

⁷ *Jackson v. Stevens Well Service*, 208 Kan. 637, 643, 493 P.2d 264 (1972).

⁸ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

treatment Dr. Jones now recommends. Accordingly, the ALJ's preliminary hearing Order is affirmed in all respects.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated January 4, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2005.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director